

IN THE
Supreme Court of the United States

October Term, 1979

No. **78-1290**

ARTHUR GOLDSTEIN

Petitioner

v.

CITY OF NORFOLK

Respondent

SUPPLEMENTAL APPENDIX

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

Paul M. Lipkin
Samuel Goldblatt
Goldblatt, Lipkin, Cohen,
Anderson & Jenkins, a
professional corporation
804 Plaza One Building
Norfolk, Virginia 23510

Counsel for Petitioner

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APPENDIX A

VIRGINIA: In the Circuit Court of the
City of Norfolk, on the 20th day of
October, in the year 1977.

CITY OF NORFOLK vs. ARTHUR GOLDSTEIN

Attorneys for the City of Norfolk:
Benjamin W. Bull
Ronald G. Thomas

Attorneys for the accused:
Samuel Goldblatt
(x) Retained Robert H. Anderson, Jr.

MISDEMEANOR TRIAL ORDER-
JURY TRIAL-
FIRST DAY

This day came the Attorneys for
the City of Norfolk and the attorneys
for the accused, as aforesaid, and came
as well the accused, who stands indicted
for Sale of obscene item on a Misdemeanor
Indictment.

Thereupon the accused, by counsel,
renewed his motion, heretofore heard in
this Court on the 19th day of October,

1977, to dismiss said Indictment; and for Change of Venue or venire in this matter, which motions, having been previously heard and determined, are denied, and exception noted.

Whereupon the accused was arraigned on the aforesaid Indictment #1, and after private consultation with his said counsel, tendered in person his plea of Not Guilty to said Indictment and desired to be tried by the Court. Whereupon the Attorney for the City of Norfolk, and the Court did not concur to which the defendant objected and excepted, and the Court then impanelled eleven qualified jurors and fourteen alternates, free from exceptions, having been obtained from the Venire Facias, duly directed and issued in accordance with the statute in such cases made and provided, and summoned by the Sheriff of the City of Norfolk. Thereupon from the original

panel of eleven jurors, after all questions had been propounded to them, the City of Norfolk and the accused each alternately struck three, and the remaining five jurors, constituting the jury for the trial of the accused, were duly sworn to well and truly try the issue joined. Thereupon, in the absence of the jury, the accused by counsel, objected to the panel selection process and moved for a mistrial, which motion, having been fully heard and determined by the Court, is overruled, and exception noted. Thereupon the City of Norfolk commenced to present evidence on its behalf. And having heard a part of the evidence, at 1:10 P.M., the jury was adjourned until 2:00 P.M.; whereupon the jury was sworn by the Court not to communicate with any outside person, nor permit any outside person to communicate with them relative to this trial, and

...not to read any newspaper accounts nor listen to nor view any radio or television broadcasts relative to this trial, but to return into Court pursuant to said adjournment and resume the consideration of this case in the same status in which it now is; and at 2:00 P.M., pursuant to the adjournment and resume the consideration of this case in the same status in which it now is; and at 2:00 P.M., pursuant to the adjournment order, the accused again came, and came as well the attorneys as aforesaid, and again came the jury heretofore sworn, and continued to hear evidence presented on behalf of the City of Norfolk. And at its conclusion, and having heard all the evidence presented on behalf of the City of Norfolk, the accused by counsel, moved the Court to strike the City of Norfolk's evidence, which motion, having been fully heard and determined by the Court, is

overruled, and exception. Thereupon the accused commenced to present evidence on his own behalf. And having heard the evidence in part, at 5:15 P.M., the jury, having been again sworn by the Court as in previous adjournment, was adjourned until tomorrow morning, Friday, the 21st day of October, 1977, at 10:00 A.M.

And the defendant was allowed to depart pursuant to the terms of his recognizance.

JOHN W. WINSTON, Judge
(Case of Arthur Goldstein)

APPENDIX B

VIRGINIA: In the Circuit Court of the City of Norfolk, on the 21st day of October, in the year 1977.

CITY OF NORFOLK vs. ARTHUR GOLDSTEIN

Attorneys for the City of Norfolk:

Benjamin W. Bull
Ronald G. Thomason

Attorneys for the accused:

Samuel Goldblatt
(x) Retained Robert H. Anderson, Jr.

MISDEMEANOR TRIAL ORDER-
JURY TRIAL-
SECOND DAY

This day again came the Attorneys for the City of Norfolk and the attorneys for the accused, and again came the said accused, who stands indicted for Sale of obscene item, and again came the jury heretofore sworn, pursuant to the adjournment order of the 20th day of October, 1977.

Thereupon the accused continued

to present evidence on his own behalf, and at its conclusion there was no evidence in rebuttal presented. And having heard all the evidence, the accused by counsel, renewed all motions previously made in this trial, which motions are overruled, and exception noted. Thereupon having heard all the evidence, the instructions of the Court, and closing argument of counsel, the jurors were sent to their jury room to consider their verdict. They subsequently returned their verdict in open court, reading: "We, the jury, find the accused guilty of the Sale of an Obscene Item as charged in the indictment and fix his punishment at a fine of \$1,000.00 and 6 months in jail. Mary C. Muckleroy Forewoman." Thereupon the jury was discharged. Thereupon the defendant by counsel, moved the Court to set aside the verdict as contrary to the law and

the evidence, and further moved the Court that he be allowed to prepare legal memoranda in support of said motion and to argue the matter before this Court, which motion, having been fully heard, is granted. And it is Ordered that the defendant be allowed Sixty (60) Days in which to prepare briefs on this motion, and further that the City of Norfolk be granted Fourteen (14) Days to respond to said briefs. And the matter is continued generally on the docket of this Court.

Thereupon on motion of the defendant by counsel, it is ordered that the said defendant be allowed to remain on bail bond currently in effect, pending ruling on the aforesaid motion.

And the defendant was allowed to depart pursuant to his recognizance.

JOHN W. WINSTON, Judge
(Case of Arthur Goldstein)

APPENDIX C

VIRGINIA: In the Circuit Court of the City of Norfolk, on the 14th day of February, in the year 1978.

CITY OF NORFOLK vs. ARTHUR GOLDSTEIN

On conviction of Sale of obscene item - On motions thereon

O R D E R

This day again came the defendant by counsel in the persons of Samuel Goldblatt and Robert H. Anderson, Jr., and came as well the Attorneys for the City of Norfolk in the persons of Benjamin W. Bull and Ronald G. Thomason.

And it appearing to the Court that by Order of this Court, heretofore entered on the 21st day of October, 1978, the said Arthur Goldstein was convicted by a jury as aforesaid, and punishment fixed by said jury; and that upon motion of the defendant by counsel, to set aside

the verdict of the jury, the Court allowed the defendant and the City of Norfolk to submit briefs thereon, and the matter was continued generally on the docket of this Court.

And the Court, having considered all briefs submitted, and now having heard argument of counsel, does overrule motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence, and exception of the defendant is noted.

Thereupon on motion of the defendant by counsel, this matter is referred to the Probation Officer of this Court for a Pre-Sentence Report, the hearing on which will be heard on a date mutually agreeable to all parties involved; and the defendant is allowed to remain on bail bond, currently in effect, pending sentencing.

JOHN W. WINSTON, Judge

APPENDIX D

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

CITY OF NORFOLK, :
Plaintiff : Indictment for
vs. : Sale of Obscene
ARTHUR GOLDSTEIN : Item: "Look"
Defendant :

MOTION FOR NEW TRIAL

NOW COMES the defendant, ARTHUR GOLDSTEIN, whose trial before a five man jury was had in this Court on October 20, 1977, and found said defendant guilty and who has not of yet been sentenced upon said verdict and moves the Court to set aside the verdict and grant him a new trial on the grounds that the jury which tried and convicted him was unconstitutionally constituted, as just decided by the Supreme Court of the United States in *Ballew versus Georgia - U.S.* (decided

March 21, 1978).

ARTHUR GOLDSTEIN

By _____
Of Counsel

Samuel Goldblatt
GOLDBLATT, LIPKIN, COHEN, ANDERSON
& JENKINS
804 One Main Plaza East
Norfolk, Virginia 23510

CERTIFICATE

I certify that a true copy of the foregoing pleading was mailed/delivered this the 24th day of March, 1978, to Benjamin W. Bull, Assistant City Attorney, 908 City Hall Building, Norfolk, Virginia.

Samuel Goldblatt

APPENDIX E

March 27, 1978

Samuel Goldblatt, Esquire
Goldblatt, Lipkin, Cohen,
Anderson and Jenkins
804 One Main Plaza East
Norfolk, Virginia 23510

Re: City of Norfolk
v. Arthur Goldstein

Dear Mr. Goldblatt:

At the jury trial held on October 20, 1977, your client did not object to the selection of a jury comprised of only five persons. Now before sentencing, and in reliance upon Ballew v. Georgia (decided by the United States Supreme Court on March 21, 1978) he moves this Court to set aside the jury verdict and to grant him a new trial. The motion was filed March 24, 1978.

The motion is denied. DeStefano v. Woods, 392 US 631 (1968); Taylor v. Louisiana, 419 US 522 (1975); Daniel v. Louisiana, 420 US 31 (1975). The rule in Ballew, *supra*, requiring at least six-person juries in nonfelony trials is not to be applied retroactively to convictions obtained by juries empaneled prior to March 21, 1978.

Very truly yours,

JWW:s

John W. Winston
Judge

cc: Benjamin W. Bull,
Assistant City Attorney

APPENDIX F

VIRGINIA: In the Circuit Court of the City of Norfolk, on the 4th day of April, in the year 1978.

CITY OF NORFOLK vs. ARTHUR GOLDSTEIN
(M340-78)

Attorneys for the City: Benjamin Bull
Attorneys for the accused: Samuel Goldblatt and Paul M. Lipkin
(Retained by the accused)

MISDEMEANOR SENTENCING ORDER.

This day again came the Attorney for the City of Norfolk and the Attorneys for the accused, as aforesaid, and came as well the defendant in person, who stands convicted on misdemeanor indictment #1 for Sale of an Obscene Item and sentenced by a jury to confinement in the City Jail for six months and a fine in the sum of \$1,000.00. Thereupon the Probation Officer of this Court, to whom this case has been previously referred for investigation, appeared in open

Court with a written report, a copy of which has been delivered to counsel for the defendant. Whereupon the defendant and his counsel were given the right to cross-examine the Probation Officer as to any additional facts bearing upon the matter as they desired to present. The report of the Probation Officer is hereby filed as a part of the record in this case. Whereupon the Court taking into consideration all of the evidence in the case, the report of the Probation Officer and such additional facts as were presented by the defendant, doth now fix the defendant's punishment at confinement in the City Jail for the term of Six Months, fined in the sum of \$1,000.00 and that he be required to pay the costs of his prosecution. Thereupon the defendant by counsel, moved the Court to postpone the said judgment, which said motion being fully heard, is

sustained, and it is ordered that the said judgment be postponed for the period of Thirty Days or until the Supreme Court of Virginia has granted an appeal in this case. It is further ordered that the transcript of the trial, when filed be made a part of the record. And the defendant was allowed to continue on bail bond and to depart,

JOHN W. WINSTON, Judge

APPENDIX G

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 20th day of November, 1978.

Arthur Goldstein, Appellant,
against Record No. 780928
Circuit Court No. M340-78

City of Norfolk, Appellee,

From the Circuit Court of the City of Norfolk

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

APPENDIX H

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of December, 1978.

Arthur Goldstein, Appellant,
against Record No. 780928
Circuit Court No. M340-78
City of Norfolk, Appellee,

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the judgment rendered herein on November 20, 1978, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and

enforcement of the judgment of this court in the above-styled case rendered on November 20, 1978, be, and the same is hereby, stayed, to and including the 18th day of February, 1979, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

Allen L. Lucy
Clerk

APPENDIX I

AMENDMENTS TO THE CONSTITUTION
OF THE UNITED STATES

AMENDMENT VI

Right to Speedy Trial, Witnesses, etc.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1.

Citizenship Rights Not
to Be Abridged by States

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

CODE OF VIRGINIA

§18.2-11. Punishment for conviction of misdemeanor. - The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than five hundred dollars, either or both.

(c) For Class 3 misdemeanors, a fine of not more than five hundred dollars.

(d) For Class 4 misdemeanors, a fine of not more than one hundred dollars. (1975, cc. 14, 15.)

§19.2-262. Waiver of jury trial; numbers of jurors in criminal cases; how jurors selected from panel. -

(2) Twelve persons from a panel of twenty shall constitute a jury in a felony case. Five persons from a panel of eleven shall constitute a jury in a misdemeanor case.

APPENDIX K

NORFOLK CITY CODE

Sec. 31-92. Punishment for violation of sections 31-86 through 31-91, 31-97 and 31-98.

Any person, firm, association or corporation committing an offense under sections 31-86 through 31-91, 31-97 and 31-98 shall be guilty of a misdemeanor and upon conviction thereof shall be confined in jail for not more than twelve months or fined not more than one thousand dollars, either or both.

Sec. 31-94. Exceptions to application of sections 31-84 through 31-99.

Nothing contained in sections 31-84 through 31-99 of this Code shall be construed to apply to:

(1) The purchase, distribution, exhibition or loan of any book, magazine or other printed or manuscript material by any library, school or institution of higher learning, supported by public appropriation;

(2) The purchase, distribution, exhibition or loan of any work of art by any museum of fine arts, school or institution of higher learning, supported by public appropriation;

(3) The exhibition or performance of any play, drama, tableau or motion picture by any theatre, museum of fine arts, school or institution of higher learning, supported by public appropriation.

Sec. 31-85. Obscene items enumerated.

Obscene items shall include:

(1) Any obscene books; or
(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words or sounds.

Sec. 31-86. Production, publication, sale, possession, etc., of obscene items.

It shall be unlawful for any person in this city knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport within this city or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport or distribute any obscene item. Possession in public or in a public place of any obscene item as defined in section 31-85 of this Code shall be deemed *prima facie* evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in section 31-85 of this Code may pass from one person, firm or corporation to another.

Sec. 31-87. Obscene exhibitions and performances.

It shall be unlawful for any person in this city knowingly to:

(1) Produce, promote, prepare, present, manage, direct, carry on or participate in any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution

under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or

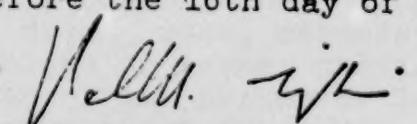
(2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.

APPENDIX L

CERTIFICATE OF SERVICE OF PETITION
FOR WRIT OF CERTIORARI

I hereby certify that I have served a copy of the Petition for Writ Certiorari to the Supreme Court of the United States upon counsel for the Respondent, Philip R. Trapani, City Attorney, and Benjamin W. Bull and Ronald G. Thomason, Assistant City Attorneys, 908 City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 16th day of February, 1979.


PAUL M. LIPKIN
Of Counsel for
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Supplemental Appendix to the Petition for Writ of Certiorari to the Supreme Court of the United States upon counsel for the Respondent, Philip R. Trapani, City Attorney, and Benjamin W. Bull and Ronald G. Thomason, Assistant City Attorneys, 908 City Hall Building, Norfolk, Virginia 23510, by depositing copies of said Supplemental Appendix to the Petition for Writ of Certiorari in the United States Mail, properly addressed with sufficient postage thereon to insure delivery.

I hereby certify that all parties required to be served have been served on or before the 20th day of February, 1979.


PAUL M. LIPKIN
Of Counsel for
Petitioner